S.B.CIVIL SECOND APPEAL NO.118/2007.
(Smt.Meena Devi & Anr. Vs. Balu Ram)

Date of Order :: 24th September 2007

HON'BLE MR. JUSTICE DINESH MAHESHWARI

Mr. M.C. Bhoot, for the appellants
Mr. J.R. Patel, for the respondent (caveator)

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By way of this appeal under Section 100 of the Code of Civil Procedure, the defendants-tenants seek to question the judgment and decree dated 29.01.2007 passed by the Additional District Judge No.3, Jodhpur in Civil Appeal No.40/2004 affirming the judgment and decree dated 30.09.2003 passed by the Additional Civil Judge (Senior Division) No.2, Jodhpur in Civil Original Suit No.80/2000.

By the impugned judgment and decree dated 30.09.2003, the learned trial court decreed the suit for eviction filed by the plaintiff-respondent on the ground of reasonable and bona fide requirement and rejected the counter claim of the defendants for fixing the standard rent at Rs.150/- per month in place of the last paid rent at Rs.225/- per month. The learned trial court, however, held the plaintiff entitled to mesne profits at the rate of Rs.500/- per month. The learned appellate court has partly allowed the appeal and set aside the

directions of the trial court allowing mesne profits at Rs.500/- per month; and has also set aside the finding of the trial court on the personal requirement of the plaintiff; but has otherwise affirmed the decree for eviction on the ground of reasonable and bona fide requirement of the suit shop for the business purposes of the sons of the plaintiff.

Briefly put, the relevant facts are that the plaintiff-respondent filed the suit aforesaid for eviction of the defendant-appellants from the suit premises essentially on the pleadings that the suit shop, situated at Pungalpara area, Jodhpur was let to the defendants on a monthly rent of Rs.225/-; that the defendants have defaulted in payment of rent; and that the suit shop was required reasonably and bona fide by the plaintiff for the business purposes of himself and his two sons Jai Kishan and Shri Kishan. In relation to the requirement, the plaintiff elaborated with the averments that his ancestral business was of preparing and selling sweetmeats; that earlier he had a shop at Pungalpara that was got vacated by his landlord; that his sons have now got training and have experience of dealing in such business of sweetmeats but were sitting idle for 5-6 years without any business; that the plaintiff was not having any other shop in the city of Jodhpur where his sons could carry on the said business and Pungalpara area was the old established market

of such business and the suit shop was suitable therefor; that the marriage prospects of the plaintiff's sons were hindered for they being not in business; that for about a year, the plaintiff was carrying on the work of preparing and selling meals in the factory of one Pukhraj and such work was required to be undertaken by the plaintiff for the purpose of earning his livelihood; and that the defendants were not carrying on any substantial work in the suit shop and were residing far away in the Housing Board area and they could obtain any other shop.

The defendants denied the pleadings in relation to default with the submissions that rent was duly deposited in the court. In relation to the pleadings of reasonable and bona fide requirement, the defendants alleged that the plaintiff was not carrying on business of sweetmeats but was selling curd and ‘namkin’ in a rented shop that he sub-let to one Madanlal after taking hefty premium; and such shop was got vacated by his landlord only on the ground of sub-letting. The assertion of bona fide requirement for the sons of the plaintiff was also denied with the averments that the plaintiff’s sons were respectively in 27 and 22 years of age; that the plaintiff, his wife, sons, and daughter-in-law were engaged in hotel business at the Industrial Area, Jodhpur having engaged several employees in the said business; that the plaintiff and his sons were not in need of the suit shop nor were sitting idle;

and that the suit shop of 9 ft. x 20 ft. size was not fit to be used for sweetmeats business nor the area in question was suitable for the said business. The defendants pointed out that the averments regarding marriage prospects of the plaintiff's sons were wrong inasmuch as his elder son was already married and other son was also engaged. The defendants also averred that they were running Typewriting Institute in the suit shop having an established business and if uprooted, shall loose their livelihood.

After framing of necessary issues and taking evidence led by the parties, the learned trial court rejected the case of the plaintiff that defendants were defaulters in payment of rent; but found proved the case of the plaintiff of requirement of the suit shop after rejecting all the grounds and contentions raised by the defendants. The learned trial court also decided the issue regarding comparative hardship in favour of the plaintiff and further found that the suit shop was not capable of being divided for the purpose of partial eviction. The learned trial court, thus, decreed the suit for eviction and allowed mesne profits at Rs.500/- per month as against the present rate of rent at Rs.225/- per month.

The learned first appellate court earlier proceeded to decide the appeal filed by the defendants on 25.04.2005 and while maintaining the decree for eviction on the ground of

reasonable and bona fide requirement set aside the order of the trial court allowing mesne profits at Rs.500/- per month and directed payment of mesne profits at Rs.225/- per month.

The judgment and decree so passed by the learned first appellate court were challenged in Civil Second Appeal No.213/2005 that was allowed by this Court on 14.11.2006; and the matter was remanded to the first appellate court with the following order:-

> "Heard learned counsel for the parties.
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> Arguments concluded.
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> The main stress of the learned counsel for the appellant was that the learned lower Appellate Court has not at all looked into any evidence available on record much less has discussed it, and appreciated it as the final court of fact even though as appears from page-3 of the impugned judgment that entire evidence was read before the learned lower Appellate Court, and it was submitted that the witnesses are giving false evidence at every stage. Notwithstanding this none of the evidence has been discussed by the learned lower Appellate Court.
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> In my view, in view of the above, the present appeal involves the following substantial question of law:-
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> > "Whether the judgment and decree of the learned lower Appellate Court is not according to law as he has not referred to the statement of any of the witnesses inspite of the fact that the entire evidence was read over before the learned lower Appellate Court?"
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> At this stage with the consent of the learned counsel for the parties, on the above substantial questions, the impugned judgment of the learned lower

> Appellate Court is set aside, and the matter is remanded back to the learned lower Appellate Court for deciding the matter afresh in accordance with law by re-appreciating entire evidence on record, and decide the appeal keeping in view the provisions of 0.41 Rule 31 C.P.C. It is also made clear that in so deciding the appeal afresh, learned lower Appellate Court will not be obsessed by any of the findings already given by it in the impugned judgment. The parties are directed to appear before the learned lower Appellate court on 1.12.2006. The learned lower Appellate Court is further directed to decide the appeal within a period of two months thereafter positively. The appeal is thus allowed as above."

After remand, the learned appellate court proceeded to deal with the appeal again by its impugned judgment dated 29.01.2007; and came to the conclusion that finding on bona fide requirement of the plaintiff himself could not be sustained but affirmed the finding of the learned trial court of requirement of the suit shop for the business purposes of the sons of the plaintiff; and set aside the directions for mesne profits at the rate of Rs.500/- per month and instead allowed the same at Rs.225/- per month.

Seeking to assail the judgment and decree passed by the learned appellate court, the tenants-appellants have preferred this appeal; and it has been suggested in the memo of appeal that certain vital facts have come on record in the evidence of the plaintiff which prove clearly that the plaintiff came out with the false case and there has not been any reasonable and bona fide requirement. The appellants submit:

“2/- That the following vital facts came on the record as per the plaintiff's own witnesses:

(i) The rented shop at Poongal Pada was handed over to one Shri Madan Lal in the year 1973-74 and the landlord of that shop filed a suit for eviction on the ground of sub-letting to Shri Madan Lal in the year 1976.

(ii) The shop in dispute was lying vacant at that time and was rented out in the year 1978.

(iii) The plaintiff started the business of handicrafts and aluminum but he closed that business also after 4-5 years.

(iv) Thereafter, the plaintiff started the business in biscuits and toffees in his own shop measuring 3' x 5' attached to his house but closed that business also after 4-5 years.

(v) The plaintiff then started the business of hotel describing it as DHABA in the industrial area where 300-350 labourers are working in the locality of this hotel/canteen.

(vi) The present suit was filed after starting of business of hotel.

(vii) According to the plaintiff's son-in-law who appeared as PW-5 the plaintiff is not doing any work for the last 20-22 years. The statement was made on 8th Feb., 2000 and the hotel business is being done by both the sons.

(viii) According to the plaintiff himself, the hotel is being run by himself and his son Jai Kishan and the other son Shri Kishan is doing job at the lodge of PW-5, plaintiff's son-in-law.

(ix) So far as running of hotel is concerned, according to the plaintiff himself, he and his son Jai Kishan are doing that business, but according to his son-in-law and the other witnesses PW-4 a friend of Shri Kishan, the hotel business is run by both the sons and the plaintiff is not doing any work.

Thus, so far as the plaintiff's case that his both the sons are sitting idle has been proved to be false and the case of the plaintiff that he was compelled to leave the business of sweets on account of the rented shop being got vacated by the landlord has also been proved to be false as the suit was filed by the landlord on the ground of sub-letting i.e. the plaintiff voluntarily closed his business and handed over the shop to sub-tenant. The sequence of facts clearly establish that when the plaintiff decided not to do any business he handed over the shop in the year 1975. The present shop was given on rent in the year 1978 when according to the plaintiff he was sitting idle.

The facts which have come on the record clearly prove that on the date of filing of the suit both the sons were doing business of hotel in the industrial area in a locality where 300-350 labourers are there and as such with no stretch of imagination it can be said that the plaintiff genuinely needed the shop reasonably and bonafidely but without looking into the matter from correct approach, the learned Trial Court decreed the suit and the learned First Appellate Court dismissed the appeal."

According to the appellants, the following substantial questions of law arise for consideration in this case:-

"(i) Whether the judgment and decree passed by the learned courts below are perverse as the above noted vital aspects of the case have not been considered?

(ii) Whether the judgment and decree of the learned Appellate Court is not according to law as he has not critically examined the statement of any of the witnesses in spite of the direction of this Hon'ble Court?

(iii) Whether the finding regarding personal and reasonable bonafide need recorded by the learned Courts below is perverse.?"

With reference to the aforesaid suggested questions of law, learned counsel Mr. M.C. Bhoot appearing for the

appellants has emphasised on the submissions that the learned first appellate court, despite directions of this Court in Civil Second Appeal No. 213/2005, has failed in its duties in critically examining the evidence available on record; that the learned first appellate court should have made proper examination of the entire evidence on record and then ought to have arrived at specific independent conclusion if the plaintiff is entitled for decree for eviction on the ground of reasonable and bona fide requirement. Learned counsel submitted that though the appellate court purported to refer to the evidence on record in the impugned judgment but then, has neither analysed the said evidence nor examined the stark contradictions in the plaintiff's pleadings and evidence and further contradictions in evidence of the plaintiff's witnesses; and that the first appellate court has failed to draw legal inferences that are available from the evidence taken as a whole. Learned counsel submitted that in view of appellate court failing to examine the evidence on record and the vital and relevant points, the finding remains perverse and deserves to be set aside. Learned counsel submitted that perversity of the findings in the present case goes to the root of the matter and thus the impugned judgment and decree deserve to be interfered with in second appeal. Learned counsel has referred to the decisions of the Hon'ble Supreme

Court in Shantilal Kesharmal Gandhi Vs. Prabhakar Balkrishna Mahanubhav : (2007) 2 SCC 619; Kulwant Kaur & Ors. Vs. Gurdial Singh Mann & Ors. : (2001) 4 SCC 262 and Hero Vinoth (Minor) Vs. Seshammal: (2006) 5 SCC 545.

Having given a thoughtful consideration to the submissions made by learned counsel for the appellant and having examined the entire record, this Court is clearly of opinion that the present appeal remains bereft of substance and does not involve any substantial question of law.

Learned counsel for the appellants has strenuously contended that the considerations of the learned appellate court stand vitiated for omission to consider the vital aspects of the matter and for omission to critically examine the entire evidence on record; and has placed strong reliance on the following observations of the Hon'ble Supreme Court in Shantilal Kesharmal Gandhi's case :-

> "7.....The appellate court should have made a proper reappraisal of the pleadings and the evidence in the case before coming to an independent conclusion of either affirming the findings of the trial court or of interfering with them. Some items of evidence brought to our notice are not seen discussed by the first appellate court. The first appellate court being the final court of fact and law, should have made a proper examination of the relevant materials."

Noteworthy it is that in the said case decree for eviction was sought on the grounds of change of user, nuisance, and

non-user, respectively under Sections 13(1)(a), (c), and (k) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. The learned trial court granted decree for eviction on all the three grounds that was affirmed in appeal and the High Court found no ground to interfere with the decisions of the two courts below. The Hon'ble Supreme Court noticed the contentions raised while attacking the decree for eviction under Section 13(1)(a) of the Act on the ground of change of user but then found no infirmity in the decree on the ground of nuisance under Section 13(1)(c) of the Act; and thus, without pronouncing on the question of eviction under Section 13(1)(a) of the Act, the Hon'ble Supreme Court said that even if the claim thereunder requires to be reconsidered, the decree for eviction under Section 13(1)(c) would survive and in such a situation found no reason to interfere with the decree for eviction as a whole.

In Kulwant Kaur's case (supra), the Hon'ble Supreme Court has observed on the scope of civil second appeal under Section 100 CPC that,-

> "34. Admittedly, Section 100 has introduced a definite restriction on to the exercise of jurisdiction in a second appeal so far as the High Court is concerned. Needless to record that the Code of Civil Procedure (Amendment) Act, 1976 introduced such an embargo for such definite objectives and since we are not required to further probe on that score, we are not detailing out, but the fact remains that while it is true that in a second appeal a finding of fact, even if erroneous, will generally not be

> disturbed but where it is found that the findings stand vitiated on wrong test and on the basis of assumptions and conjectures and resultantly there is an element of perversity involved therein, the High Court in our view will be within its jurisdiction to deal with the issue. This is, however, only in the event such a fact is brought to light by the High Court explicitly and the judgment should also be categorical as to the issue of perversity vis-a-vis the concept of justice. Needless to say however, that perversity itself is a substantial question worth adjudication - what is required is a categorical finding on the part of the High Court as to perversity."

In Hero Vinoth's case (supra), the Hon'ble Supreme Coput has said,-

> "19. It is not within the domain of the High Court to investigate the grounds on which the findings were arrived at, by the last court of fact, being the first appellate court. It is true that the lower appellate court should not ordinarily reject witnesses accepted by the trial court in respect of credibility but even where it has rejected the witnesses accepted by the trial court, the same is no ground for interference in second appeal when it is found that the appellate court has given satisfactory reasons for doing so. In a case where from a given set of circumstances two inferences of fact are possible, the one drawn by the lower appellate court will not be interfered by the High Court in second appeal. Adopting any other approach is not permissible. The High Court will, however, interfere where it is found that the conclusions drawn by the lower appellate court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at by ignoring material evidence."
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> (underlining supplied)

The Hon'ble Surpeme Court has further laid down,-

> "24. The principles relating to Section 100 CPC relevant for this case may be summarized thus

…. …. ….

> (iii) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (i) the courts below have ignored material evidence or acted on no evidence; (ii) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (iii) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

Thus, it is to be imbibed that the scope for interference with concurrent findings of facts in second appeal under Section 100 CPC is a limited one; and re-appreciation of evidence is not taken up as a matter of course unless the courts below have misdirected themselves or where the evidence, taken as a whole, is not reasonably capable of supporting the finding.

It needs no elaboration that the finding on reasonable and bona fide requirement is essentially a finding of fact; and when concurrently returned by the two courts below, the scope for interference in the second appeal under Section 100 of the Code of Civil Procedure is definitely limited and restricted. The appraisal of evidence and recording of a conclusion is required to be examined taking the matter as a whole; and it is not the isolated or segregated parts or pieces of evidence and their

consideration that would be decisive of the case. Mere reference to one aspect here or another aspect there cannot lead to the conclusion if, taken as a whole, the decree could be sustained or not.

It is of course true that if a clear case of perversity is made out and that has got direct bearing on the issue involved, in an appropriate case the evidence could be taken up for re-appreciation even in second appeal; but equally true it is that if the view taken by the appellate court remains a view available on preponderance of evidence, a civil second appeal cannot be converted into another appeal on the questions of fact.

Examining the matter with reference to the law explained by the Hon'ble Supreme Court, this court finds that the present one is not a case of the finding on reasonable and bona fide requirement being vitiated for any perversity or misdirection. The so-called "vital aspects" as suggested in the memo of appeal (reproduced supra) are either not of any relevance at all or are so trivial in nature or so insignificant that the same do not have a bearing on the ultimate conclusion of reasonable and bona fide requirement.

So far the aspects regarding the plaintiff sub-letting his rented premises and, therefore, the same having been got vacated by his landlord; of the plaintiff starting some business

of his own in a shop measuring 3 ft. x 5 ft. attached to his house; and of letting out the shop in question in the year 1978 are concerned, suffice is to say that the learned first appellate court has found that it were not a case where decree for eviction on bona fide requirement of the suit premises for plaintiff's own business be granted. Decree for eviction having not been granted on the personal necessity of the plaintiff himself, the arguments concerning the plaintiff or his dealings are not of much relevance. The plaintiff filed the suit in the year 1997 stating the age of his sons at 27 years and 22 years. Obviously, the fact that the suit premises were let out in the year 1978 has no bearing on the requirement of the said sons of the plaintiff.

So far the presently run business is concerned, that has been described as Dhaba by the plaintiff and as a hotel by the defendants, significant it is to notice that the plaintiff has categorically established that the said one was not any settled business of permanent character; was required to be run about 20 kms. away from the house for the purpose of earning livelihood; and was ultimately dependent upon the pleasure of the factory owner. There is nothing on record to show if the plaintiff or his sons have established permanent business at the said Industrial Area; and such business is sufficient to cater to the need of both the sons and the family. The

emphasis that the plaintiff has not been truthful on the earnings of his sons or that there has been contradictions in the statements of the plaintiff's sons and their witnesses, this Court, after examining the evidence on record, is satisfied that in the overall circumstances of the case whether one son of the plaintiff or both of them were engaged in the said business at Industrial Area, the same has no substantial bearing on the matter inasmuch as the said business has not been shown to be a permanent and settled business. It has been categorically established that the plaintiff's sons are not in any settled job, business, or employment; and such fact remains the core and fundamental fact while examining the question of reasonable and bona fide requirement of the suit shop for their business.

The submission that the learned appellate court has merely reproduced the evidence but has not critically examined the same does not appear correct. In paragraph 7 of the impugned judgment, the learned appellate Judge has dealt with the argument impeaching the truthfulness of the plaintiff in relation to the variance in the statements relating to size of the suit shop, conduct of the plaintiff in vacating the earlier rented premises, and of the marital status of his sons; and has rejected the same. Thereafter the learned Judge has referred to the evidence of the plaintiff PW-1 stating that the work of Dhaba was not of reasonable financial support to the

family and could at any time be discontinued by the factory owner. The learned Judge has also referred to the statement of PW-2 Jai Kishan again pointing out the Dhaba business to be of temporary character and he and his brother intending to start sweetmeats business. The learned Judge has also referred to the statement of Shri Kishan PW-3 that at present he was sitting on the hardware shop of his sister's husband. The learned appellate court has also noticed the statements of PW-4 Bharat Singh and PW-5 Satish Garg that the sons of the plaintiff were working on the said Dhaba and intend to start their business at the suit shop. The learned Judge has also referred to the statement of the appellant Inder Lal including his admission that Pungalpara area was famous for sweets' business and that he would not take the shop stated by him to be available in the house of the plaintiff, the same being smaller in size. It has also been noticed that the defendant had no proof available in support of the assertion that the plaintiff's son was a partner in hardware business. The learned appellate Judge has also referred to the features available from the statements of DW-2 Meena Devi and DW-3 Babu Lal.

It is not correct to say that the learned appellate Judge has not recorded the finding in accordance with law or has not drawn legal and logical inference after examining the evidence as a whole. The learned appellate Judge has taken note of all

the relevant and material part of the evidence of the plaintiff and so also the defendants and has thereafter observed:

> "उपरोक्त साक्ष्य के समग्र विवेचन से यह स्थिति स्पष्ट प्रकट होती हैं कि वादी के पास स्वयं की कोई दुकान अपने पुत्रों के मिठाई का व्यवसाय करने के लिए उपलब्ध नहीं है जो दुकान उसके घर के पास बताई गई हैं वह इतनी छोटी हैं कि उसे प्रतिवादी भी लेने को तैयार नहीं है । वादी के सभी साक्षीगण ने भी यह स्पष्ट कथन किया हैं कि वादी के पुत्र वादग्रस्त दुकान में अपनी मिठाई बनाने का व्यवसाय करना चाहते हैं मजबूरी में एक पुत्र को ढाबे पर काम करना पड़ रहा हैं दूसरे पुत्र को हार्डवेयर की दुकान पर काम करना पड़ रहा हैं । वादी के साक्षीगण ने ढाबा सांगरिया में जोधपुर से काफी दूर होना बताया है । प्रतिवादी के गवाह ने यह स्वीकार किया हैं कि वादी का एक पुत्र रेस्टोरेंट चलाता हैं व एक पुत्र हार्डवेयर का काम करता हैं ।"

The learned appellate Judge has then recorded categoric finding thus:

> "वादी के यह स्पष्ट अभिकथन हैं कि उसके पुत्र वर्तमान में जो कार्य कर रहे हैं उससे उनकी रोजीरोटी ठीक से नहीं चल रही है । ढाबे का व्यवसाय कभी भी फैक्टरी मालिक बंद करवा सकता हैं व दोनों लड़को को मिठाई बनाने व विक्रय करने का अनुभव है जो उनकी पुश्तैनी धंधा हैं जिस हेतु वादग्रस्त दुकान की युक्तियुक्त व सदभाविक आवश्यकता बताई हैं । उपरोक्त अभिकथनों के संबंध में ठोस साक्ष्य वादी की ओर से प्रस्तुत की गई हैं जिसमें वादी स्वयं व उनके दोनों पुत्र न्यायालय के समक्ष उपस्थित हुए हैं । प्रतिवादी ने इसके खण्डन में यह साक्ष्य दी हैं कि वादग्रस्त दुकान मिठाई के व्यवसाय के लिए उपयुक्त नहीं हैं व वादी के पुत्र मिठाई का व्यवसाय नहीं करना चाहते हैं । मेरे मत में वादी की साक्ष्य अधिक विश्वसनीय हैं क्योंकि स्वयं प्रतिवादी ने जिरह में यह स्वीकार कर लिया हैं कि पुंगलपाड़ा मिठाई के व्यवसाय के लिए प्रसिद्ध हें व वादग्रस्त दुकान के आसपास मिठाई की अन्य दुकानें भी अच्छी

चल रही है । जब वादी व वादी के दोनों पुत्र न्यायालय के समक्ष यह कथन लेकर आये हैं कि उन्हे मिठाई का व्यवसाय करने के लिए वादग्रस्त दुकान की आवश्यकता हैं तो उनकी आवश्यकता निश्चित रूप से सदभाविक हैं व इसे केवल चाहत मात्र नहीं माना जा सकता ।"

Having examined the record in its totality, this Court is satisfied that the findings recorded by the learned trial court and by the learned first appellate court remain valid findings of fact. The averments and evidence relating to the marital status of the sons of the plaintiff and number of years they were sitting idle are not of such material implication that for any discrepancy therein, the requirement established by the plaintiff shall turn out to be unreasonable or non-genuine. Further, the discrepancy on the fact as to who is engaged in Dhaba business, as to whether plaintiff and both his sons were engaged therein or if only one son of the plaintiff was managing the said business, are not the vital aspects; but the vital one is the fact that the plaintiff's sons are not in any settled job, employment, or business and they intend to start their business in the suit shop. Requirement of the suit shop for sweetmeats business by the plaintiff's sons cannot be said to be a mere desire falling short of element of need.

Finding on reasonable and bona fide requirement in this case remains a valid finding of fact; and having examined the

material on record, this Court finds no reason to take any different view of the matter or to disturb the findings recorded by the learned subordinate courts.

The appeal does not involve any substantial question of law and is, therefore, dismissed summarily.

(DINESH MAHESHWARI), J.

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